[Cite as *State v. Dohm*, 2010-Ohio-6567.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-076**
- vs -	:	
STEVEN F. DOHM,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 000605.

Judgment: Affirmed in part, reversed in part, and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Timothy Young, Ohio Public Defender, and *Melissa M. Prendergast*, Assistant State Public Defender, 250 East Broad Street. #1400, Columbus, OH 43215-9308 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} After trial by jury, appellant, Steven F. Dohm, was convicted of two counts of drug trafficking in the vicinity of a juvenile and sentenced to the maximum term of imprisonment for each crime. Appellant now appeals his conviction. For the reasons discussed in this opinion, we affirm in part, reverse in part, and remand the matter for further proceedings.

{¶2} In late 2007, on two separate days, appellant sold Confidential Informant 794 ("CI 794") crack cocaine during two controlled drug buys. Special Agent 82 ("SA 82"), of the Lake County Narcotics Agency, oversaw the buys and was the principal liaison between the agency and CI 794 during the transactions.

{¶3} The first controlled purchase occurred on the evening of December 5, 2007 at the River Isle apartment complex in Willoughby, Ohio. On that date, arrangements were made for CI 794 to meet appellant in apartment A16, which belonged to an associate of CI 794, Rob Bernstein. At the time of the incident, CI 794 was also residing in apartment A16 with his fiancé and her three-year-old daughter.

{¶4} Before commencing the buy, SA 82 checked CI 794 for contraband, outfitted the informant with an audio transmitter, provided him with $100 in Lake County Narcotics Agency money to purchase the crack cocaine, and completed certain agency paperwork related to the buy. With respect to the transmitter, SA 82 testified such wires typically permit an investigating officer to hear exactly what a CI hears; the clarity, however, varies depending upon the distance, weather, and building in which the CI makes the purchase.

{¶5} After preparations were completed, SA 82 drove CI 794 to a location approximately 200 yards from the apartment complex. CI 794 exited the vehicle and walked toward "Building A" of the River Isle apartment complex. After entering the building, SA 82 lost sight of CI 794, but could still hear via the transmitter. Once CI 794 was in the building, SA 82 testified he could hear several voices, including that of a young child and a voice CI 794 identified as appellant. While inside the apartment, CI 794 testified appellant gave him a cellophane bag of crack cocaine in exchange for

$100. After the transaction, which took approximately three to four minutes, CI 794 then left the building and met SA 82 at a designated meeting location.

{¶6} Once he reunited with SA 82, CI 794 turned over the crack cocaine he had purchased to SA 82. CI 794 was then "debriefed," i.e., he was asked a series of questions about the buy and again searched by SA 82. The two men subsequently drove to another location where SA 82 removed the transmitter. After CI 794 submitted a statement regarding the transaction, he exited SA 82's vehicle and left. Testing confirmed that the drug purchased from appellant was .33 grams of crack cocaine.

{¶7} Several days later, on the evening of December 10, 2007, CI 794 contacted SA 82 indicating he could do another controlled buy at the same apartment building. On this date, the transaction was arranged with the assistance of Rob Bernstein. Similar to the first buy, CI 794 was outfitted with a wire transmitter and given $100 in Lake County Narcotics Agency money to purchase crack cocaine. After being checked for contraband and completing the necessary documentation, CI 794 exited SA 82's vehicle and walked toward the building.

{¶8} Once inside the building, CI 794 was directed to apartment A21 to meet with appellant. Upon entering, CI 794 noticed five children between the ages of three and 12 in the apartment's living room. CI 794 proceeded to a back bedroom where he met appellant and an individual referred to as "Jose" to complete the transaction. CI 794 testified that, upon entering the bedroom, appellant again sold him $100 in crack cocaine. Shortly after the exchange, CI 794 returned to SA 82's vehicle and handed SA 82 the drugs. CI 794 was again debriefed and searched. SA 82 then drove to a different location where CI 794 surrendered the purchased drugs and the transmitter

was removed. Testing later confirmed appellant had purchased.78 grams of crack cocaine.

{¶9} On January 5, 2009, appellant was indicted by the Lake County Grand Jury on two counts of trafficking in cocaine, felonies of the fourth degree, each in violation of R.C. 2925.04(A)(1). Appellant entered a plea of "not guilty" to the charges. The matter proceeded to jury trial, after which appellant was found guilty on both counts. He was eventually sentenced to 18 months on each count, to be served consecutively, for a total of three years imprisonment.

{¶10} Appellant now appeals and assigns three errors for our consideration. We shall begin our analysis by addressing appellant's second assignment of error, which provides:

{¶11} "The trial court allowed the State to protect the identity of the confidential informant, whose name was already known to Mr. Dohm, without a valid reason to do so. Protecting the informant's identity provided the jury with the inference that Mr. Dohm was a violent person who would retaliate against him. This ruling violated Mr. Dohm's right to a fair trial and deprived him of Due Process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution."

{¶12} Appellant argues that the trial court erred in permitting the state to keep CI 794's identity confidential in a public trial where the informant's name was already known to the defendant. According to appellant, there was no compelling reason to conceal CI 794's identity and, in his view, the state's only purpose in moving the court to

keep his identity confidential was to improperly bolster the informant's credibility as a witness. We disagree.

{¶13} We first point out that appellant failed to object to the state's request to conceal CI 794's identity during the proceedings and therefore waived all but plain error. The Supreme Court of Ohio has held that "[p]lain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Moreland* (1990), 50 Ohio St.3d 58, 62.

{¶14} Prior to the commencement of trial, the state asked the court to order all parties to refer to the confidential informant as CI 794 "*** so there's not a public record of the Defendant's name - -." In response, defense counsel stated he had no problem with the state's request to the extent CI 794 did not deny his prior convictions at trial. If CI 794 did so, defense counsel stated his identity should be disclosed. The prosecutor represented that he did not anticipate CI 794 would deny his past convictions, "[b]ut certainly if that comes up, then we can revisit the name issue ***."

{¶15} Contrary to appellant's argument, the above exchange suggests the state did have a valid, reasonable foundation for keeping CI 794's name confidential. By keeping his identity off the record, police could still use him as a confidential informant for controlled drug buys in the future. For this reason alone, appellant's argument fails.

{¶16} Appellant nevertheless speculates that the concealment of CI 794's identity on record permitted the jury to infer he is a violent person who might retaliate against the informant. Given the nature of the case and the evidence submitted at trial, however, we do not believe such an inference is plausible.

{¶17} Appellant was not charged with a crime of violence and the evidence did not indicate he was a volatile or violent individual. Moreover, there was nothing in the record to suggest appellant had a predisposition to retaliate or "act out" when circumstances did not favor his interests. With these points in mind, the jury could not reasonably infer the concealment of CI 794's identity was to protect the witness from appellant, but, rather, to simply protect CI 794's identity for his usefulness as an informant in future cases.

{¶18} Regardless of these points, any potential error which could be ascribed to the concealment of CI 794's identity was invited. "Under the invited-error doctrine, a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make. ***" (Citations omitted). *State v. Nievas* (1997), 121 Ohio App.3d 451, 456. Although we believe there was no obvious error in keeping CI 794's identity secret, defense counsel agreed that concealing his identity was not a problem, so long as CI 794 did not deny his past criminal history. CI 794 did not deny his prior convictions. Because no additional reservations were expressed by defense counsel regarding the concealment of the informant's identity, any error issuing from the concealment was invited.

{¶19} Appellant's second assignment of error is overruled.

{¶20} His first assignment of error provides:

{¶21} "The trial court violated Mr. Dohm's right to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution when it convicted him of two counts of trafficking in drugs in the vicinity of a juvenile when that was against the manifest weight of the evidence."

{¶22} A manifest weight challenge concerns:

{¶23} "'the inclination of the greater *amount* of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.'" (Emphasis sic.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing Black's Law Dictionary (6th Ed. 1990).

{¶24} In short, a manifest weight inquiry analyzes whether the state met its burden of persuasion at trial beyond a reasonable doubt. Id. at 390. In weighing the evidence submitted at a criminal trial, an appellate court must defer to the factual findings of the jury regarding the weight to be given the evidence and credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶25} Appellant argues the jury lost its way in convicting him because CI 794's testimony was inherently unreliable and the state offered no corroborating evidence to buttress CI 794's testimony. In support, appellant argues CI 794 had been previously convicted of "crimes of dishonesty," viz., misdemeanor receiving stolen property in 2002 and felony receiving stolen property in 2005. Moreover, appellant observes the audio tapes of the controlled buys fail to directly implicate him as the seller. Although appellant's points are factually true, we do not believe they militate heavily against the jury's verdict.

{¶26} The jury heard that CI 794 had been previously convicted of crimes of dishonesty; it also heard that he received $50 for each controlled buy and was a crack cocaine user himself. Nevertheless, CI 794 provided a concise, detailed version of what he observed during the transactions, the most salient point was his identification of appellant as the individual who had the crack and accepted money in exchange for the crack. Moreover, SA 82 bolstered CI 794's testimony by providing corroborating details of the surrounding circumstances of the purchases. SA 82 testified to the official protocol he and CI 794 went through both prior to and after each of the controlled buys. As indicated above, the jury is the arbiter of witness credibility and is responsible for assessing the veracity of a witness. *Moreland*, supra. Although no other eye witnesses were called by the state, we hold there was sufficient, credible evidence on which the jury could rely to support its verdict.

{¶27} Appellant's first assignment of error is overruled.

{¶28} Appellant's final assignment of error alleges:

{¶29} "The trial court unlawfully imposed consecutive terms of imprisonment when it did not make the findings required by statute."

{¶30} Under his final assignment of error, appellant contends the trial court erred in failing to make factual findings pursuant to R.C. 2929.14(E)(4) prior to imposing consecutive sentences. We agree with appellant's argument.

{¶31} On January 14, 2009, in *Oregon v. Ice* (2009), 129 S.Ct. 711, the United States Supreme Court determined the Sixth Amendment does not prohibit states from assigning to judges, rather than to juries, the finding of facts necessary to the imposition of consecutive, rather than concurrent, sentences for multiple offenses. Id. at 717-718.

In support of its decision, the Court observed: "[t]he historical record demonstrates that the jury played no role in the decision to impose sentences consecutively or concurrently. Rather, the choice rested exclusively with the judge." Id. at 717. Hence, the court reasoned, when a court is required to make factual findings before imposing consecutive sentences:

{¶32} "[t]here is no encroachment *** by the judge upon facts historically found by the jury, nor any threat to the jury's domain as a bulwark at trial between the State and the accused. Instead, the defendant—who historically may have faced consecutive sentences by default—has been granted by some modern legislatures statutory protections meant to temper the harshness of the historical practice." Id. at 718.

{¶33} Pursuant to *Ice*, the requirement that a judge find specific facts prior to imposing consecutive sentences is constitutionally permissible and does not run afoul of a defendant's Sixth Amendment right to a trial by jury.

{¶34} Although the Supreme Court of Ohio severed R.C. 2929.14(E)(4) from Ohio's felony sentencing code in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the General Assembly has nevertheless kept the statutory mandates inherent in R.C. 2929.14(E)(4) intact through eleven amendments since *Foster*'s release. The most recent amendment occurred after the issuance of the decision in *Ice*. The effective date of this amendment was April 7, 2009. In light of *Ice* and the General Assembly's most recent amendment to R.C. 2929.14, this court recently held, in *State v. Jordan*, 11th Dist. No. 2009-T-0110, 2010-Ohio-5183, at ¶14, that a sentencing judge, pronouncing a sentence after April 7, 2009, must again, as before *Foster*'s release, make certain

specific findings of fact before imposing consecutive sentences on a defendant. In so holding, this court emphasized:

{¶35} "It is the judiciary's role to apply properly enacted laws to the extent they are constitutional. See *State v. Cunningham*, 113 Ohio St.3d 108, 113, 2007-Ohio-1245. In *Ice*, the United States Supreme Court held that statutory sentencing provisions that require judicial factfinding as a prerequisite to imposing consecutive sentences to be constitutional. This ruling was based upon *Apprendi* and its progeny, the same body of law upon which the Ohio Supreme Court based its decision in *Foster*. Because *Foster* extrapolated from *Apprendi* and its progeny that laws which require judicial factfinding as a necessary precondition to imposing consecutive sentences are unconstitutional, it, in this regard, was improperly decided. Subsequent to *Ice*, the legislature re-imposed the requirement that a sentencing judge must make certain findings before imposing consecutive sentences. Pursuant to the holding in *Ice*, this legislation is constitutional and thus it is a trial court's duty to apply that law as it is written." *Jordan*, supra, at ¶20.

{¶36} Despite these points, the dissent contends the April 7, 2009, post-*Ice* amendment did not have the effect of reenacting the provision because it did not change or modify language of the original severed subsection. According to the dissent, the legislature's intent is manifested in the changes it specifically makes in passing and codifying an amendment to an existing statute. Because no specific changes were made to R.C. 2929.14(E)(4) in the April 7, 2009 amendment, the dissent maintains the General Assembly did not intend to reenact the provision. In support, the

dissent cites to the Supreme Court's decision in *Stevens v. Ackman*, 91 Ohio St.3d 182, 2001-Ohio-249.

{¶37} In *Stevens*, R.C. 2744.02(C), the statutory section granting a political subdivision the ability to appeal a trial court's denial of immunity, had been previously declared unconstitutional for violating the "one-subject" provision of the Ohio Constitution. Subsequently, the legislature passed a bill which included an amendment to R.C. 2744.02(B)(2), a section addressing the liability of a political subdivision for the negligence of its employees. Although its content had not changed, R.C. 2744.02(C) also appeared in the newer legislation. In holding the later legislation did not reenact R.C. 2744.02(C), the Court examined the intent of the General Assembly in passing the legislation. The Court initially pointed out that "[a]t the time [the later legislation] was passed, the General Assembly had no reason to believe that the purported enactment of R.C. 2744.02(C), attempted a short time earlier ***, would later be found to be unsuccessful." *Stevens*, supra, at 193. The Court also considered the "printing format" of the later legislation as an indication of intent, observing "R.C. 2744.02(C) appears in the printed act in regular type, without capitalization that would indicate new material ***." *Stevens*, supra at 194. We do not believe the decision in *Stevens* has any significant impact on our analysis of the applicability of current R.C. 2929.14(E)(4).

{¶38} First of all, the instant legislation does not require an examination of the legislature's intent. "Where the language [of a statute] itself clearly expresses the legislature's intent, the courts need to look no further." *Katz v. Dept. of Liquor Control* (1957), 166 Ohio St. 229, 231; see, also, *Kendall v. United States Dismantling Co.* (1985), 20 Ohio St.3d 61, 64. The language of R.C. 2929.14(E)(4) is neither uncertain,

ambiguous, nor otherwise obscure. As a result, it is our duty, as a court of law, to give effect to the language in the statute, not to delete or insert words and meanings. *Wheeling Steel Corp. v. Porterfield* (1970), 24 Ohio St.2d 24, 28. Because there is no allegation that the April 7, 2009 amendment was invalid, we must apply R.C. 2929.14(E)(4), which was deemed constitutional by *Ice*, as written, without recourse to the arcane methodology set forth in *Stevens*.

{¶39} Further, it is necessary to note an additional, salient distinction between *Stevens* and the case at bar: Several months prior to the effective date of current R.C. 2929.14(E)(4), the United States Supreme Court specifically declared that judicial fact finding as a precondition for imposing consecutive sentences was constitutionally permissible. There was no intervening decision issued by a high court that the panel in *Stevens* was required to consider.

{¶40} The United States Supreme Court is the highest authority on matters of constitutional interpretation. See, e.g., *Marbury v. Madison* (1803), 5 U.S. 137, 177. ("It is emphatically the province and duty of the judicial department to say what the law is.") The Court's holding in *Ice* was built upon the same Sixth Amendment jurisprudence as the Ohio Supreme Court's ruling in *Foster.* Id. at 3. ("The question presented *** is whether Ohio's felony sentencing structure violates the Sixth Amendment to the United States Constitution in the manner set forth in *Apprendi v. New Jersey* (2000), 530 U.S. 466, and *Blakely v. Washington* (2004), 542 U.S. 296[.]") *Ice*, therefore, substantively overruled *Foster* as it pertained to R.C. 2929.14(E)(4). Because the legislature has manifested an intent to keep R.C. 2929.14(E)(4) a codified provision of Ohio's statutory scheme post-*Foster*, and the effective date of the most recent amendment to R.C.

2929.14(E)(4) occurred subsequent to the release of *Ice*, there is no sensible justification for ignoring the mandates of current R.C. 2929.14(E)(4). Thus, now, as before *Foster*:

{¶41} "a court may not impose consecutive sentences for multiple offenses unless it 'finds' three statutory factors. R.C. 2929.14(E)(4). First, the court must *find* that consecutive sentences are necessary to protect the public from future crime or to punish the offender. Id. Second, the court must *find* that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. Id. Third, the court must *find* the existence of one of the enumerated circumstances in R.C. 2929.14(E)(4)(a) through (c)." (Emphasis sic.) *State v. Comer*, 99 Ohio St.3d 463, 466, 2003-Ohio-4165.

{¶42} One final point on this issue requires attention. Although not thoroughly articulated in *Jordan*, the requirements of R.C. 2929.19(B)(2)(c) were also revitalized by *Ice* and the legislature's April 7, 2009 amendment. Prior to *Foster*, R.C. 2929.19(B)(2)(c) required a sentencing court that imposes consecutive sentences to state the reasons for its R.C. 2929.14(E)(4) findings to assist in appellate review. See *Comer*, supra, at 467-468. (Pointing out that "*** the requirement that a court give its reasons for selecting consecutive sentences is separate and distinct from the duty to make the findings.") R.C. 2929.19(B)(2), of course, was, like R.C 2929.14(E)(4), also severed from Ohio's felony sentencing code in *Foster*. Id. at paragraphs one and two of the syllabus. Similar to R.C. 2929.14(E)(4), R.C. 2929.19(B)(2) was not repealed post-*Foster*, but simply ignored by virtue of *Foster*. Because R.C. 2929.19(B)(2) is subject to the April 7, 2009 amendment, we expressly hold its mandates, like those of R.C.

2929.14(E)(4) are also binding on the trial court at sentencing hearings occurring after April 7, 2009.

{¶43} The trial court in this case sentenced appellant on May 28, 2009, but neither made the necessary findings for imposing consecutive sentences as required by R.C. 2929.14(E)(4) nor stated its reasons to support those findings as required by R.C. 2929.19(B)(2)(c). We therefore hold the trial court erred in failing to adhere to the statutory mandates set forth in recently amended R.C. 2929.14(E)(4) and R.C. 2929.19(B)(2)(c).

{¶44} Appellant's third assignment of error is sustained.

{¶45} For the reasons discussed above, appellant's first and second assignments of error are without merit; appellant's third assignment of error, however, is sustained. The judgment of the Lake County Court of Common Pleas is therefore affirmed in part, reversed in part, and remanded.

TIMOTHY P. CANNON, J., concurs,

DIANE V. GRENDELL, J., concurs in part, and dissents in part, with a Concurring/Dissenting Opinion.

DIANE V. GRENDELL, J., concurs in part, and dissents in part, with a Concurring/Dissenting Opinion.

{¶46} I concur in the majority's judgment with respect to the first two assignments of error, confirming the appellant's convictions. I respectfully dissent from

the judgment with respect to the third assignment of error, ordering the appellant to be resentenced.

{¶47} The majority's position that, since R.C. 2929 was amended post-*Ice* with the language of R.C. 2929.14(E)(4) existing as did pre-*Foster*, the General Assembly has, in effect, re-enacted ("re-imposed") R.C. 2929.14(E)(4) is erroneous and contrary to Ohio law.

{¶48} The Ohio Supreme Court has long held: "Where there is reenacted in an amendatory act provisions of the original statute in the same or substantially the same language and the original statute is repealed in compliance with Section 16, Article II of the Constitution, such provisions will not be considered as repealed and again reenacted, but will be regarded as having been continuous and undisturbed by the amendatory act." *In re Allen* (1915), 91 Ohio St. 315, at paragraph one of the syllabus.

{¶49} Thus, the inclusion of R.C. 2929.14(E)(4) in the April 7, 2009 amendment of R.C. 2929 does not have the effect of re-enacting that provision. Rather, this provision must be considered as having been continuously and uninterruptedly unconstitutional since the Ohio Supreme Court's decision in *Foster*.

{¶50} This conclusion is demonstrated by considering a similar situation from Ohio legal history. In 1997, the General Assembly enacted R.C. 2744.02(C), which provided that an order denying a political subdivision immunity was a final order. In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123, the Ohio Supreme Court struck down, in toto, Am.Sub.H.B. No. 350, which had enacted R.C. 2744.02(C). Subsequent amendments to R.C. 2744 included division 02(C), providing that the denial of immunity is a final order.

{¶51} Attorneys for political subdivisions continued to file interlocutory appeals of such orders, arguing that this provision had been re-enacted by subsequent amendments to the statute. This argument was rejected by every appellate court of which I am aware. See e.g. *Tignor v. Franklin Cty. Bd. of Commrs.*, 10th Dist. No. 99AP-571, 2000 Ohio App. LEXIS 1814, at *7; *Taylor v. Cty. of Cuyahoga*, 8th Dist. No. 75473, 2000 Ohio App. LEXIS 137, at *4.

{¶52} This position was unequivocally rejected by the Ohio Supreme Court in *Stevens v. Ackman*, 91 Ohio St.3d 182, 2001-Ohio-249, at paragraph two of the syllabus ("R.C. 2744.02(C) was neither enacted nor reenacted by 1997 Am.Sub.H.B. No. 215"), and 195 ("[w]hen this court in *Sheward* struck down Am.Sub.H.B. No. 350, it struck down the version of R.C. 2744.02(C) that Am.Sub.H.B. No. 350 attempted to enact, and R.C. 2744.02(C) remains invalid as a result of *Sheward*"). In addition to the *Allen* case, cited above, the Supreme Court relied on the following precedents: *In re Hesse* (1915), 93 Ohio St. 230, 234 ("provisions contained in the act as amended which were in the original act are not considered as repealed and again reenacted, but are regarded as having been continuous and undisturbed by the amendatory act"); and *Weil v. Taxicabs of Cincinnati, Inc.* (1942), 139 Ohio St. 198, 206 ("by observing the constitutional form of amending a section of a statute the Legislature does not express an intention then to enact the whole section as amended, but only an intention then to enact the change which is indicated"; "[a]ny other rule of construction would surely introduce unexpected results and work great inconvenience") (citation omitted).

{¶53} Accordingly, I do not agree that R.C. 2929.14(E)(4) has been legislatively re-enacted, rather, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, remains the law of

this State. *State v. Lenoir*, 5th Dist. No. 10CAA010011, 2010-Ohio-4910, at ¶¶51-59 (rejecting the argument that R.C. 2929.14(E)(4) has been legislatively re-enacted) (citations omitted).